Supreme Court, U.S.
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No. 96-106

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD., and MOTORCITY OF JACKSONVILLE, INC.,
*Petitioners,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## SUPPLEMENTAL BRIEF OF PETITIONERS

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Pursuant to Rule 15.8 of this Court, petitioners file this supplemental brief to address "intervening matter not available at the time of" petitioners' prior brief. First, in *Atherton* v. *FDIC*, No. 95-928 (Jan. 14, 1997), this Court ruled that federal common law in the area of thrift director liability had ceased to exist prior to FIRREA. See slip op. at 12-13. Like this petition, *Atherton* involved pre-FIRREA conduct and a post-FIRREA receiver. Thus, *Atherton* provided the greatest possible benefit for lower courts by determining that state law governs in cases of either pre-FIRREA or post-FIRREA conduct. Similarly, granting certiorari to settle the acknowledged circuit conflict presented by this petition will have an equally broad benefit by resolving both whether federal common law applies to pre-FIRREA transactions and whether it applies to post-FIRREA transactions. See Reply Br. at 5-6.

Second, the open circuit split presented by this petition has recently widened. In *Young* v. *FDIC*, 1997 WL 7689 (4th Cir. Jan. 10, 1997), a case also involving pre-FIRREA conduct and a post-FIRREA receivership, the Fourth Circuit, expressly relying on the Eleventh Circuit's decision in this case, held that "Section 1823(e) does not . . . preempt the D'Oench doctrine." *Id.* at *5; see *id.* at *1-*3. *Young* demonstrates that, despite the FDIC's arguments to this Court, the circuit split presented by this petition will not go away.

Respectfully submitted,

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